

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF LABOR AND INDUSTRY

M. Scott Brener, Commissioner,

Complainant,

vs.

Building Restoration Corporation,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS,
AND ORDER

A hearing in this matter was held on January 5, 2005, before Administrative Law Judge Beverly Jones Heydinger, at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota, pursuant to a Notice and Order for Hearing dated July 1, 2004. The hearing record closed upon submission of the last post-hearing memorandum on March 18, 2005.

Julie A. Leppink, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of M. Scott Brener, Commissioner (Complainant). Timothy A. Sullivan, Best & Flanagan LLP, 225 South Sixth Street, Suite 4000, Minneapolis, MN 55402-4690, appeared on behalf of Building Restoration Corporation (Respondent).

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat. §§ 182.661, subd. 3, and 182.664, subd. 5, the employer, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Order.

STATEMENT OF THE ISSUES

Did the Respondent violate the OSHA standard for exposure to crystalline silica, and, if so, was the penalty amount properly calculated?

FINDINGS OF FACT

1. On June 26 and 27, 2002, Occupational Safety and Health Investigator Peter Kuzj conducted an inspection of work performed by the Respondent on the campus of Hamline University, St. Paul, MN. The inspection was scheduled after a Notice of Silica in Construction form was filed with the Minnesota Department of Labor

and Industry, Occupational Safety and Health Division ("MN OSHA"), noting that exterior tuck pointing work was planned.^[1]

2. MN OSHA assists the United States Department of Labor with enforcement of OSHA standards, and participated in its Special Emphasis Program (SEP) for Silicosis. The purpose of the SEP was "to reduce and eliminate the workplace incidence of silicosis from exposure to crystalline silica."^[2]

3. Silicosis is a deadly lung disease, and construction workers who breathe in crystalline silica, a fine, sandy dust, are at risk of the illness.^[3]

4. Mr. Kuzj is an industrial hygienist, with a specialty in air and noise. He has been employed by the Department of Labor and Industry for six years, and was previously employed by the Department of Health as an indoor air quality consultant. In addition to his Bachelor's Degree in chemistry and biology, Mr. Kuzj has received over 100 hours of training by MN OSHA.

5. During his inspection of the Respondent's work site, Mr. Kuzj observed men grinding mortar from between the bricks of the building, creating dust.^[4]

6. Each of the Respondent's employees was individually fitted with a new respirator mask, was trained to use it properly and change the filters, and was required to wear the respirator at all times when grinding mortar.^[5] The Respondent investigated several different types of masks and selected the ones that were the best available.^[6] On the day of the inspection, the employees were wearing half-mask negative pressure respirators with a P100 HEPA filter.^[7]

7. On June 27, 2002, Mr. Kuzj conducted full-shift silica sampling on three employees.^[8] In order to conduct the silica sampling, Mr. Kuzj calibrated three AirChek Personal Samplers.^[9] The pumps were calibrated in order to measure the amount of air that flowed through so that the proportion of particles could be determined. Mr. Kuzj attached an air sampler to each of three employees. On that day, one man was working on the east side of the building, and two were working on the west side, spaced apart.^[10] The samplers tested the air in the area where the employees were working.^[11] The first sampling began at approximately 5:50 a.m., and continued until approximately 1:00 p.m.^[12]

8. The employees were spaced apart at the work site. There were no fans or vacuums in use. There was no apparent limitation on the time any one employee was assigned to grind mortar. The grinding was done dry rather than wet because wet dust impairs visibility and requires the workers to wear uncomfortable rain suits.^[13]

9. No samples were taken from the air passing through the employees' masks. The respirators have a HEPA filter that will filter out particulates of 5 microns or smaller, and have an assigned protection factor (APF) of "10," which means that a user would inhale less than one tenth of the contaminant present.^[14]

10. Mr. Kuzj remained on the site throughout the day in order to change the cassettes that collect the particles, and to check the times that the employees were grinding mortar. Monitoring did not require his constant attention, and he acknowledged that he could have napped, read, done some writing, or relaxed while the tests were running. Occasionally he leaves the job site during the testing although he did not leave on June 27th.^[15]

11. Mr. Kuzj collected a total of nine samples, three from each employee, but he discarded one because the employee had tipped it over. He submitted eight others for testing, plus a blank. Four samples, numbers 11850, 11851, 11852, and 11853, were collected while the tested employee was grinding mortar. The Sample Collection Worksheet shows the sampling times, the flow readings and volumes collected.^[16]

12. After Mr. Kuzj completed the monitoring, he retained the samples until they were turned over to the Department of Health on July 8, 2002 to be analyzed for respirable dust and crystalline silica.^[17] The testing was done by a private laboratory on July 16, 2002,^[18] and the results were included in a report from the Department of Health, issued on August 9, 2002. The tests showed the presence of quartz in samples 11850, 11851, 11852, 11853.^[19] Based on the test data, Mr. Kuzj determined that one of the employees was exposed to silica at 22 times the permissible exposure level ("PEL"), and the other was exposed to 5.4 times the PEL.^[20] Although the tolerances allowed by MN OSHA and federal OSHA regulations are not measured in the same way, there is a standard conversion methodology that MN OSHA followed in this case.^[21]

13. Once MN OSHA determined that there was a violation of the standards, it determined the type of violation, and the amount of the penalty. It set the penalty level at "serious," defined, in relevant part, as "violation of any standard, rule, or order which creates a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use...."^[22]

14. Because of the risk of silicosis created from exposure to crystalline silica, MN OSHA determined that the violation was "serious." Although Mr. Kuzj found that there were three violations, only one penalty was assessed because the three violations arose from the same incident.^[23] The maximum penalty for a serious violation, not involving the death of an employee, is \$7000. In this case the base penalty was set at \$5000, taking into account the number of employees exposed; proximity to the hazard; duration of the hazard, work conditions; and additional instances.^[24] Credits of up to 95 percent may reduce the penalty. In this case, the employer was credited 20 percent for good faith, 40 percent because of the size of its business, and 10 percent because of its lack of violations in the preceding three years.^[25] The resulting penalty was \$1500, a 70 percent reduction.^[26]

15. On September 27, 2002, MN OSHA issued a Citation and Notification of Penalty for a “serious” violation of 29 CFR § 1926.55(a): “Employee(s) were exposed to material(s) at concentrations above those specified in the “Threshold Limit Values of Airborne Contaminants for 1970” of the American Conference of Governmental Industrial Hygienists,” and a \$1500 penalty assessed. Two additional violations were cited, for failing to provide respirators applicable and suitable for the intended purpose, in violation of 29 CFR § 1910.134(a)(2), and feasible administrative or engineering controls were not implemented to reduce employee exposure, in violation of 29 CFR § 1926.55(b).

16. The applicable federal regulation states that exposure of employees to inhalation of certain substances, including crystalline silica, should be avoided. “To achieve compliance ... administrative or engineering controls must first be implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or other protective measures shall be used to keep the exposure of employees to air contaminants within the [prescribed] limits.”^[27]

17. MN OSHA issued the citation based on its conclusion that the Respondent’s employees had been exposed to excess levels of silica, the respirators did not provide adequate protection, and the Respondent had not implemented all feasible administrative and engineering controls.^[28]

18. At the time the Citation and Notification of Penalty was issued, Shirley Chase was the Commissioner of Labor and Industry.

19. On January 13, 2003, MN OSHA served the Complaint on the Respondent, issued in the name of Jane Volz, who had been named Commissioner of Labor and Industry by the Governor, subject to confirmation by the Minnesota Senate. The President of the Senate received notice of her appointment on January 6, 2003, and the Secretary of State received notice on January 7, 2003. The Respondent filed its Answer to the Complaint on January 24, 2003. M. Scott Brener, the current Commissioner, was named to the position on April 17, 2003.^[29]

20. Any Finding of Fact more properly termed as a Conclusion is hereby adopted as a Conclusion.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. § § 182.661, subd. 3, and 14.50.

2. The Commissioner of Labor and Industry gave Respondent proper notice of the hearing, and fulfilled all relevant substantive and procedural requirements of statute and rule.

3. The Respondent is an employer, as defined in Minn. Stat. § 182.651, subd. 7.

4. The Complainant has the burden of proof to establish by a preponderance of the evidence the occupational safety and health violation charged, and the appropriateness of the penalty proposed.

5. Shirley Chase, Commissioner, had the authority to issue the Citation and Notification of Penalty on September 27, 2002.

6. Jane Volz, Commissioner, had the authority to pursue enforcement at the time the Complaint was issued on January 13, 2003. An individual named as Commissioner may exercise duties upon receipt of the letter of appointment by the President of the Senate, and that letter had been received at the time the Complaint was issued.^[30]

7. As Commissioner, M. Scott Brener had the authority to pursue this action. By participating in this proceeding, he demonstrated his intent to do so, and may be substituted as the Complainant.^[31]

8. The Complainant has demonstrated by a preponderance of the evidence that the Respondent's employees were exposed to levels of crystalline silica that exceeded the permissible level, in violation of 29 CFR § 1926.55 (a).

9. The Complainant has demonstrated by a preponderance of the evidence that the Respondent failed to provide respirators with an assigned protection factor adequate to protect its employees, in violation of 29 CFR § 1910.134.

10. The Complainant has demonstrated by a preponderance of the evidence that the Respondent failed to reduce the level of exposure through the use of all feasible administrative and engineering controls, in violation of 29 CFR § 1926.55 (b) because the Respondent did not show that use of fans or vacuums, or limiting the time spent grinding, were not feasible.

11. The Complainant established the basis for the penalty imposed, and the reasonableness of the penalty amount, by a preponderance of the evidence.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. M. Scott Brener shall be substituted as the Commissioner of Labor and Industry, and the caption amended accordingly.
2. Exhibits 14, 15, 23-26 are ADMITTED.
3. Citation #1, Items 1a through 1c of the Citation and Notification issued to Building Restoration Corporation is AFFIRMED.
4. Building Restoration Corporation shall immediately pay a total penalty of \$1,500.00 to the Minnesota Department of Labor and Industry at the following address:
Department of Labor and Industry
Minnesota OSHA Compliance
443 Lafayette Road North
St. Paul, MN 55155

Dated this 18th day of April, 2005.

s/Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Tape-recorded (six tapes)

NOTICE

Unpaid fines are increased to 125% of the original assessed amount if not paid within 60 days after the fine becomes a final order. After that 60 days, unpaid fines shall accrue an additional penalty of 10% per month compounded monthly until the fine is paid in full or the fine has accrued to 300% of the original assessed amount. ^[32]

MEMORANDUM

The Commissioner must prove by a preponderance of the evidence that the Respondent violated an applicable standard, that an employee had access to the hazard, and that the employer knew or with the exercise of reasonable diligence could have known of the hazard. ^[33]

The Respondent does not dispute that the OSHA standards for exposure to silica apply to its operation. It acknowledged that it was aware of the hazard presented by silica in the dust from the grinding during the tuck pointing of an old building on the

campus of Hamline University, and that its employees were exposed to it. In fact, it was because the Respondent was aware of the silica and its danger that it provided half-face negative pressure masks with HEPA filters for its employees.

However, the Respondent denies that the employees were actually exposed to harmful levels of silica because employees wore appropriate respirators with adequate filters. It challenges MN OSHA's practice of testing the air outside of the masks rather than testing the air that its employees were breathing through the mask, and contends that the air that the employees breathed did not present any hazard. It also asserts that it employed all feasible administrative and engineering controls to reduce exposure.

MN OSHA contends that the applicable regulations require that administrative and engineering steps must be implemented first to prevent exposure to silica, and that protective equipment may be used to achieve full compliance^[34] "when effective engineering controls are not feasible, or while they are being instituted."^[35] For this reason, it tests the air outside of the employees' masks, and determines if feasible administrative or engineering steps could have been taken to lower the exposure.^[36]

The OSHA case law is clear that testing outside of the respirators is an acceptable method, so long as its within the employee's breathing zone, and so long as actual ingestion or inhalation is not a part of the applicable standard.^[37]

Here, the investigator asserted that keeping the mortar wet, using vacuums and fans, and limiting the time any employee ground the mortar would reduce the exposure, and that all such steps were feasible. He also asserted that full-face masks would provide greater protection. The Respondent presented convincing evidence that wetting the mortar was not feasible because it would impair vision, and require rain suits that would be miserable for the employees to wear in the summer months. The wet grinding process also burns out the drills more quickly. The Respondent also showed that full-face masks would interfere with the use of protective eyewear, and might not provide any greater protection. However, the Respondent did not explain why fans and vacuums were not feasible or would not reduce exposure to silica. The investigator also recommended that the employees be spaced and their grinding time limited. It appears from the photographs that the employees were spaced apart. It is not clear whether the time that they spent grinding the mortar was limited. If the times had been limited, the amount of silica in the samples would have been lower, as is apparent from the differences in results between workers with varying periods of grinding.^[38]

Testimony at the hearing showed that the employees' respirators rated a protection factor of 10, meaning that an employee wearing the respirator would be safe from exposure to respirable crystalline silica up to 10 times the PEL. The evidence showed that one employee was exposed at 5.4 times PEL, which could be reduced below the PEL, but the employee exposed at 22 times the PEL would have exceeded acceptable limits, even with a respirator.

Respondent may be correct that no administrative or engineering controls would entirely eliminate the risk. However, a significant reduction may be sufficient. “Feasible” has been defined to be “achievable.”^[39]

Respondent also challenged the test results because, it contended, the chain of custody did not show the transfer of the samples to the independent private laboratory where the tests were actually performed or the lab’s qualifications, the inspector was napping at times, and the sampling was not done inside the masks. Exhibit 14 shows the chain of custody to David Foster, who performed the lab tests on July 16, 2002. Exhibit 15 includes the lab’s qualifications and accreditation. There is no evidence that the chain of custody was broken or that the lab was substandard. Additionally, the results of the sample testing were consistent with the visual inspection^[40] and the Respondent does not contest that the ambient air surrounding the workers would have contained silicates. It offered no conflicting testing data. Thus there is no reasonable basis to question the validity of the reported test results, performed by a certified laboratory, under contract to the Department of Health. There is always a chance of error, but the consistency of the results with the observed conditions strongly suggests otherwise. Moreover, the crux of the dispute is whether the Respondent employed all feasible administrative and engineering steps to reduce exposure.

The inspector acknowledged that he occasionally naps, reads, or even leaves the work site while the sampling is occurring, and that he may have napped on the day of this investigation. However, as more fully addressed above, the testing results were consistent with his observations, and not rebutted by any evidence offered by the Respondent. Although Mr. Gandsey observed Mr. Kuzj napping, he was not certain of the times and acknowledged that Mr. Kuzj was wearing sunglasses. He also challenged the times that he was purportedly grinding mortar, but admitted that he had not kept any records on that day. The weight of the evidence supports the violation.

MN OSHA does not dispute that its testing was done outside the respirators but correctly demonstrated that the OSHA regulations require administrative and engineering steps first to prevent exposure, and that wearing protective equipment is used when other steps are not feasible to achieve full compliance. Thus, Respondent’s argument that wearing the respirators was an administrative control is inconsistent with the federal regulations.^[41]

MN OSHA has fully supported the type and amount of penalty assessed. The penalty was properly characterized as “serious” because exposure to crystalline silica can cause silicosis, a deadly disease, and is linked to increased risk of lung cancer. Thus, exposure creates a substantial probability of serious physical harm or death. Exhibit 13 fully describes how the amount of the base penalty was calculated, taking into account the severity and probability, and also describes the 70% reduction applied for good faith, safety and health, and size. MN OSHA has demonstrated that the penalty was calculated in accordance with its standard procedure, and was reasonable in light of the circumstances.

BJH

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- [1] Ex. 1.
[2] Ex. 2.
[3] Ex. 3; Ex. 2, p. 13.
[4] Test. of Peter Kuzj.
[5] Test. of Stephen Gandsey, employee.
[6] Test. of Dale Zoerb, president of Building Restoration Corporation.
[7] Ex. 24. A photo of this mask, and others displayed at the hearing, were substituted for the masks in the record. Exs. 23-26.
[8] Ex. 5; Test. of P. Kuzj.
[9] Ex. 7.
[10] Ex. 6 (the photos were taken on June 27, 2002); Ex. 8.
[11] Test. of P. Kuzj.
[12] Ex. 8.
[13] Test. P. Kuzj, test. D. Zoerb.
[14] Exs. 11,12.
[15] Test. of P. Kuzj; Exs. 20, 21, 22.
[16] Ex. 8; Test. of P. Kuzj.
[17] Ex. 8.
[18] Exs. 14 and 15. These exhibits were offered after the hearing and have been received over Respondent's objection.
[19] Ex. 9.
[20] Ex. 5; Ex. 8, p. 3.
[21] Ex. 10; Test. of P. Kuzj; *see also Ohio Cast Products, Inc. v. Occup. Safety & Health Review Comm'n*, 246 F. 3d. 791 (6th Cir. 2001).
[22] Minn. Stat. § 182.651, subd. 12.
[23] Ex. 4; Test. of P. Kuzj.
[24] Ex. 5; Ex. 13, pp. 3-6, 11, 24, App. IV-D-3.
[25] Ex. 13, pp. 7-10; Test. of P. Kuzj.
[26] Ex. 4; Test. of P. Kuzj.
[27] 29 CFR §§ 1926.55 (a) and (b), 1910.134(a).
[28] Ex. 4.
[29] Although there was no evidence of the appointment dates, they are a matter of public record, and the administrative law judge takes judicial notice of the appointments. Minn. R. 1400.7300, subp. 4.
[30] Minn. Stat. §§ 15.066, subd. 2; 15.06, subd. 5.
[31] Minn. R. Civ. P. 25.04.
[32] Minn. Stat. § 182.666, subd. 7.
[33] *Secretary of Labor v. American Steel Erectors, Inc.*, 2003 WL 22339201 (O.S.H.R.C.) (2003).
[34] 29 CFR § 1926.55 (b).
[35] 29 CFR § 1910.134
[36] Respondent contends that no citation should issue for observed exposure unless required equipment was not working. That mischaracterizes Ex. 13, V1-3 which states: "If personal protective equipment is worn, such exposure may be cited only where the standard requires engineering or administrative...controls...."
[37] *Secretary of Labor v. Gunito Corp.*, 2004 WL 2218467 (O.S.H.R.C.), 20 O.S.H. Cas. (BNA) 1983 (at page 7), citations omitted.
[38] Ex. 8, p. 3.
[39] *Secretary of Labor v. G & C Foundry Co.*, 1996 WL 490135 (O.S.H.R.C.A.L.J.) (1997), citing *Harmony Blue Granite Co.*, 11 BNA OSHC 1277, 1279, 1983-84 CCH OSHD para 26,467, p. 33,649 (No. 14189, 1983).
[40] "Employee exposure is established if the [investigator] actually witnesses, observes, or monitors exposure...." Ex. 13, V1-3 (emphasis added).

^[41] 29 CFR §§ 1926.55(a) and (b); 1910.134(a).